

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT SABAITIS and CHRISTINE
SABAITIS,

UNPUBLISHED
January 3, 2003

Plaintiffs/Counter-Defendants-
Appellees,

v

GREGORY C. WITTMAN and TILEMAN AND
SONS,

Nos. 231848, 232308
Washtenaw Circuit Court
LC No. 99-010854-CK

Defendants/Counter-Plaintiffs-
Appellants.

Before: Whitbeck, C.J., Zahra and Murray, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order awarding judgment for plaintiffs and the granting of attorney fees and costs in favor of plaintiffs in this consolidated breach of contract case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants entered into a contract with plaintiffs to install ceramic tile in plaintiffs' home for a total price of \$17,300. Plaintiffs paid defendants pursuant to the contract, however, within one month of the installation of the ceramic tiles, plaintiffs discovered cracks in the installed tiles. Plaintiffs filed a claim for breach of contract seeking \$28,410.56, as costs to replace and repair the tiles. Subsequently, defendants filed an action in district court against plaintiffs claiming that defendants were still owed \$2,100 under the contract. The district court case was removed to the circuit court and consolidated with the previously filed action. The trial court entered judgment in favor of plaintiffs in the amount of \$6,817.29, and found that defendants were entitled to nothing on their claim. The trial court then amended its judgment to include case evaluation sanctions, therefore awarding plaintiffs \$12,998.20.

Defendants' first issue on appeal is that the trial court abused its discretion in denying defendant's motion to adjourn because plaintiffs were being "less than responsive" with discovery. We disagree. We review a lower court's decision to deny an adjournment for an abuse of discretion. MCR 2.503(D)(1); *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). "The burden of proof is on the party asserting an abuse of discretion." *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993).

In determining whether a trial court abused its discretion in denying a continuance, “we consider whether ‘(1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court’s abuse of discretion.’” *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995), citing *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

The trial court did not abuse its discretion in failing to grant an adjournment. A trial court may deny an adjournment based on discovery if the moving party lacked diligence, was at fault, or was in some way negligent. *Michigan State Highway Com v Redmon*, 42 Mich App 642, 646; 202 NW2d 527 (1972). Although during the motion for adjournment plaintiffs admitted that there was outstanding discovery due, defendants also had discovery outstanding. Therefore, the trial court’s remedy of denying an adjournment, but ordering discovery to be completed by both parties prior to August 9, 2000, was not an abuse of discretion. Additionally, defendants have failed to demonstrate any prejudice resulting from the trial court’s denial of the adjournment. Defendants admit that plaintiffs partially complied with the discovery order prior to August 9, 2000, and further admit that all of the evidence that defendants needed to prepare for trial was received nine days prior to the new trial date of October 20, 2000. Moreover, defendants never requested a continuance prior to the new trial date of October 20, 2000. “The longstanding rule of this state is that in the absence of a request for a continuance, a trial court should assume that a party does not desire a continuance.” *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000). Accordingly, the denial of the adjournment was not an abuse of discretion.

Defendants further argue on appeal that the trial court erred in allowing plaintiffs to amend and supplement their claim on the day of trial. We disagree. Plaintiffs did not amend their complaint at any time during the proceedings. Therefore, this assertion lacks merit. Moreover, plaintiffs are allowed to assert additional theories that support their previously pleaded claims at trial. *Iron County v Sundberg, Carlson & Assocs*, 222 Mich App 120, 124-125; 564 NW2d 78 (1997).

According to MCR 2.111, which governs general rules of pleading, a pleader must state a cause of action “with the specific allegations necessary reasonably to inform the adverse party of the nature of the *claims* the adverse party is called on to defend.” MCR 2.111(B)(1)(Emphasis added). However, only claims of fraud or mistake must be plead with particularity. MCR 2.112(B)(1); *Iron County, supra*, 222 Mich App 124. Further, if during discovery, evidence leads to new theories supporting a claim pled previously, then this is not a new claim for relief that must be pled separately. *Iron County, supra*, 222 Mich App 124-125. Plaintiffs sued on the basis of breach of contract due to the fact that defendants “failed to install the subject floor in a workman like manner according to standard practices.” Plaintiffs’ theory put forth in their complaint was that the improper installation was due to the presence of “cold joints” where “cold joints” should not exist. However, following discovery, plaintiffs put forth additional theories at trial that the improper installation was also due to the lack of expansion joints and a generally too thin “mud set” that resulted in the cracks in the tile floor. Thus, we conclude that the trial court did not abuse its discretion in allowing the plaintiffs’ to present additional theories at trial. Further, if defendants were concerned that the pleaded factual allegations lacked specificity, then defendants had the ability to file (1) a motion for a more definite statement under MCR

2.115(A), or (2) interrogatories requesting greater factual specificity regarding plaintiffs' claims. *Iron Co, supra*, 222 Mich App 125.

Defendants' next issue on appeal is that the trial court erred in allowing the trial to continue after the plaintiffs failed to present any evidence that supported their claim. Defendants failed to support this issue with any analysis on appeal. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) citing *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Consequently, we decline to address this issue.

Defendants' final argument on appeal is that the trial court erred in excluding defendants "exhibit T" because the writing was authentic. This claim lacks merit. "[A]uthentication does not eliminate the need to show that the content of the writing is admissible despite the hearsay bar. . ." *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995), citing Graham, Handbook of Federal Evidence (3d ed), § 901.0 p 1011.

Moreover, regardless of authenticity, the trial court appeared to exclude the evidence based upon hearsay. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996). Hearsay is defined as a statement "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *Nemeth v Ford Motor Co*, 61 Mich App 359, 361-362; 232 NW2d 404 (1975). Defendants were offering this document extra judicially and to prove the truth of the matter asserted. Therefore, the trial court did not abuse its discretion in excluding "exhibit T."

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Christopher M. Murray